What Prohibition Has Done to America

By

FABIAN FRANKLIN

It is evident from the way thousands of our best citizens break the 18th Amendment daily that they do not consider it worthy of respect. How the 18th Amendment violates the principle which lies at the bottom of respect for law; how it makes for despotism, whether by a majority or a minority; these and other aspects of Prohibition by Constitution are briefly stated in this book.

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FOREWORD

"WHEN the lazy or dull-witted students fail in the examination," said a wise schoolmaster, "I try to find out what is wrong with the boys; when the best in the class fail to pass, I try to find out what is wrong with myself."

The Eighteenth Amendment is treated with contempt, the Volstead act for its enforcement is violated without compunction, by countless thousands of our best citizens. It is idle to try to find out what is the matter with these people; they are as good as we have, or can ever hope to have. The thing to do is to find out what is the matter not with the law-breakers but with the law.

How the Eighteenth Amendment is a crime against the Constitution of the United States; how it violates the principle which lies at the bottom of respect for law; how it makes for despotism, whether by a majority or a minor-

ity; these and other aspects of National Prohibition are briefly discussed in this book.

Of such discussion of the fundamental issues of Prohibition there has been a lamentable dearth. It is the author's hope that this little book will contribute in some degree toward the rescue of the country from the evils to which he directs attention—toward its return to a sound view of the relation of government to life. Unless it does so return, the injury already done to American institutions and to the temper of American life will prove but a foretaste of others perhaps even more destructive of the spirit of liberty and individuality.

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CHAPTER I

PERVERTING THE CONSTITUTION

THE object of a Constitution like that of the United States is to establish certain fundamentals of government in such a way that they cannot be altered or destroyed by the mere will of a majority of the people, or by the ordinary processes of legislation. The framers of the Constitution saw the necessity of making a distinction between these fundamentals and the ordinary subjects of law-making, and accordingly they, and the people who gave their approval to the Constitution, deliberately arrogated to themselves the power to shackle future majorities in regard to the essentials of the system of government which they brought into being. They did this with a clear consciousness of the object which they had in view—the stability of the new government and the protection of certain funda-

mental rights and liberties. But they did not for a moment entertain the idea of imposing upon future generations, through the extraordinary sanctions of the Constitution, their views upon any special subject of ordinary legislation. Such a proceeding would have seemed to them far more monstrous, and far less excusable, than that tyranny of George III and his Parliament which had given rise to the American Revolution.

Until the adoption of the Eighteenth Amendment, the Constitution of the United States retained the character which properly belongs to the organic law of a great Federal Republic. The matters with which it dealt were of three kinds, and three only—the division of powers as between the Federal and the State governments, the structure of the Federal government itself, and the safeguarding of the fundamental rights of American citizens. These were things that it was felt essential to remove from the vicissitudes attendant upon the temper of the majority at any given time. There was not to be any

doubt from year to year as to the limits of Federal power on the one hand and State power on the other; nor as to the structure of the Federal government and the respective functions of the legislative, executive, and judicial departments of that government; nor as to the preservation of certain fundamental rights pertaining to life, liberty and property. That these things, once laid down in the organic law of the country, should not be subject to disturbance except by the extraordinary and difficult process of amendment prescribed by the Constitution was the dictate of the highest political wisdom; and it was only because of the manifest wisdom upon which it was based that the Constitution, in spite of many trials and drawbacks, commanded, during nearly a century and a half of momentous history, the respect and devotion of generation after generation of American citizens.

Although the Constitution of the United States has been pronounced by an illustrious British statesman the most wonderful work

ever struck off at a given time by the brain and purpose of man, it would be not only folly, but superstition, to regard it as perfect. It has been amended in the past, and will need to be amended in the future. The Income-Tax Amendment enlarged the power of the Federal government in the field of taxation, and to that extent encroached upon a domain theretofore reserved to the States. The amendment which referred the election of Senators to popular vote, instead of having them chosen by the State Legislatures, altered a feature of the mechanism originally laid down for the setting up of the Federal government. The amendments that were adopted as a consequence of the Civil War were designed to put an end to slavery and to guarantee to the negroes the fundamental rights of freemen. With the exception of the amendments adopted almost immediately after the framing of the Constitution itself, and therefore usually regarded as almost forming part of the original instrument, the amendments just referred to are the only

ones that had been adopted prior to the Eighteenth; and it happens that these amendments—the Sixteenth, the Seventeenth, and the group comprising the Thirteenth, Fourteenth and Fifteenth—deal respectively with the three kinds of things with which the Constitution was originally, and is legitimately, concerned: the division of powers between the Federal and the State governments, the structure of the Federal government itself, the safeguarding of the fundamental rights of American citizens.

One of the gravest indictments against the Eighteenth Amendment is that it has struck a deadly blow at the heart of our Federal system, the principle of local self-government. How sound that indictment is, how profound the injury which National Prohibition inflicted upon the States as self-governing entities, will be considered in a subsequent chapter. At this point we are concerned with an objection even more vital and more conclusive. Upon the question of centralization or decentralization, of Federal power or State

autonomy, there is room for rational difference of opinion. But upon the question whether a regulation prescribing the personal habits of individuals forms a proper part of the Constitution of a great nation there is no room whatever for rational difference of opinion. Whether Prohibition is right or wrong, wise or unwise, all sides are agreed that it is a denial of personal liberty. Prohibitionists maintain that the denial is justified, like other restraints upon personal liberty to which we all assent; anti-prohibitionists maintain that this denial of personal liberty is of a vitally different nature from those to which we all assent. That it *is* a denial of personal liberty is undisputed; and the point with which we are at this moment concerned is that to entrench a denial of liberty behind the mighty ramparts of our Constitution is to do precisely the opposite of what our Constitution—or any Constitution like ours—is designed to do. The Constitution withdraws certain things from the control of the majority for the time being—withdraws them from the province of

ordinary legislation—for the purpose of *safeguarding liberty;* the Eighteenth Amendment seizes upon the mechanism designed for this purpose, and perverts it to the diametrically opposite end, that of *safeguarding the denial of liberty.* All history teaches that liberty is in danger from the tyranny of majorities as well as from that of oligarchies and monarchies; accordingly the Constitution says: No mere majority, no ordinary legislative procedure, shall be competent to *deprive* the people of the liberty that is hereby *guaranteed* to them. But the Eighteenth Amendment says: No mere majority, no mere legislative procedure, shall be competent to *restore* to the people the liberty that is hereby *taken away* from them.

Thus, quite apart from all questions as to the merits of Prohibition in itself, the Eighteenth Amendment is a Constitutional monstrosity. That this has not been more generally and more keenly recognized is little to the credit of the American people, and still less to the credit of the American press and

of those who should be the leaders of public opinion. One circumstance may, however, be cited which tends to extenuate in some degree this glaring failure of political sense and judgment. There have long been Prohibition enactments in many of our State Constitutions, and this has made familiar and commonplace the idea of Prohibition as part of a Constitution. But our State Constitutions are not Constitutions in anything like the same sense as that which attaches to the Constitution of the United States. Most of our State Constitutions can be altered with little more difficulty than ordinary laws; the process merely takes a little more time, and offers no serious obstacle to any object earnestly desired by a substantial majority of the people of the State. Accordingly our State Constitutions are full of a multitude of details which really belong in the ordinary domain of statute law; and nobody looks upon them as embodying that fundamental and organic law upon whose integrity and authority depends the life and safety of our institutions. The Constitution

of the United States, on the other hand, is a true Constitution—concerned only with fundamentals, and guarded against change in a manner suited to the preservation of fundamentals. To put into it a regulation of personal habits, to buttress such a regulation by its safeguards, is an atrocity for which no characterization can be too severe.

And it is something more than an atrocity; the Eighteenth Amendment is not only a perversion but also a degradation of the Constitution. In what precedes, the emphasis has been placed on the perversion of what was designed as a safeguard of liberty into a safeguard of the denial of liberty. But even if no issue of liberty entered into the case, an amendment that embodied a mere police regulation would be a degradation of the Constitution. In the earlier days of our history —indeed up to a comparatively recent time— if any one had suggested such a thing as a Prohibition amendment to the Federal Constitution, he would have been met not with indignation but with ridicule. It would

not have been the monstrosity, but the absurdity, of such a proposal, that would have been first in the thought of almost any intelligent American to whom it might have been presented. He would have felt that such a feature was as utterly out of place in the Constitution of the United States as would be a statute regulating the height of houses or the length of women's skirts. It might be as meritorious as you please in itself, but it didn't belong in the Constitution. If the Constitution is to command the kind of respect which shall make it the steadfast bulwark of our institutions, the guaranty of our union and our welfare, it must preserve the character that befits such an instrument. The Eighteenth Amendment, if it were not odious as a perversion of the power of the Constitution, would be contemptible as an offense against its dignity.

CHAPTER II

CREATING A NATION OF LAW-BREAKERS

In his baccalaureate address as President of Yale University, in June, 1922, Dr. Angell felt called upon to say that in this country "the violation of law has never been so general nor so widely condoned as at present," and to add these impressive words of appeal to the young graduates:

> This is a fact which strikes at the very heart of our system of government, and the young man entering upon his active career must decide whether he too will condone and even abet such disregard of law, or whether he will set his face firmly against such a course.

It is safe to say that there has never been a time in the history of our country when the President of a great university could have found

it necessary to address the young Americans before him in any such language. There has never been a time when deliberate disregard of law was habitual among the classes which represent culture, achievement, and wealth—the classes among whom respect for law is usually regarded as constant and instinctive. That such disregard now prevails is an assertion for which President Angell did not find it necessary to point to any evidence. It is universally admitted. Friends of Prohibition and enemies of Prohibition, at odds on everything else, are in entire agreement upon this.

It is high time that thinking people went beyond the mere recognition of this fact and entered into a serious examination of the cause to which it is to be ascribed. Perhaps I should say the causes, for of course more causes than one enter into the matter. But I say the cause, for the reason that there is one cause which transcends all others, both in underlying importance and in the permanence of its nature. That cause does not reside in

any special extravagances that there may be in the Volstead act. The cardinal grievance against which the unprecedented contempt for law among high-minded and law-abiding people is directed is not the Volstead act but the Eighteenth Amendment. The enactment of that Amendment was a monstrosity so gross that no thinking American thirty years ago would have regarded it as a possibility. It is not only a crime against the Constitution of the United States, and not only a crime against the whole spirit of our Federal system, but a crime against the first principles of rational government.

The object of the Constitution of the United States is to imbed in the organic law of the country certain principles, and certain arrangements for the distribution of power, which shall be binding in a peculiar way upon generation after generation of the American people. Once so imbedded, it may prove to be impossible by anything short of a revolution to get them out, even though a very great majority of the people should desire to do so.

If laws regulating the ordinary personal conduct of individuals are to be entrenched in this way, one of the first conditions of respect for law necessarily falls to the ground. That practical maxim which is always appealed to, and rightly appealed to, in behalf of an unpopular law—the maxim that if the law is bad the way to get it repealed is to obey it and enforce it—loses its validity. If a majority cannot repeal the law—if it is perfectly conceivable, and even probable, that generation after generation may pass without the will of the majority having a chance to be put into effect—then it is idle to expect intelligent freemen to bow down in meek submission to its prescriptions.

Apart from the question of distribution of governmental powers, it was until recently a matter of course to say that the purpose of the Constitution was to protect the rights of minorities. That it might ever be perverted to exactly the opposite purpose—to the purpose of fastening not only upon minorities but even upon majorities for an unlimited future the

will of the majority for the time being—certainly never crossed the mind of any of the great men who framed the Constitution of the United States. Yet this is precisely what the Prohibition mania has done. The safeguards designed to protect freedom against thoughtless or wanton invasion have been seized upon as a means of protecting a denial of freedom against any practical possibility of repeal. Upon a matter concerning the ordinary practices of daily life, we and our children and our children's children are deprived of the possibility of taking such action as we think fit unless we can obtain the assent of two-thirds of both branches of Congress and the Legislatures of three-fourths of the States. To live under such a dispensation in such a matter is to live without the first essentials of a government of freemen.

I admit that all this is not clearly in the minds of most of the people who break the law, or who condone or abet the breaking of the law. Nevertheless it is virtually in their minds. For, whenever an attempt is made to

bring about a substantial change in the Prohibition law, the objection is immediately made that such a change would necessarily amount to a nullification of the Eighteenth Amendment. And so it would. People therefore feel in their hearts that they are confronted practically with no other choice but that of either supinely submitting to the full rigor of Prohibition, of trying to procure a law which nullifies the Constitution, or of expressing their resentment against an outrage on the first principles of the Constitution by contemptuous disregard of the law. It is a choice of evils; and it is not surprising that many good citizens regard the last of the three choices as the best.

How far this contempt and this disregard has gone is but very imperfectly indicated by the things which were doubtless in President Angell's mind, and which are in the minds of most persons who publicly express their regret over the prevalence of law-breaking. What they are thinking about, what the Anti-Saloon League talks about, what the Prohibition en-

forcement officers expend their energy upon, is the sale of alcoholic drinks in public places and by bootleggers. But where the bootlegger and the restaurant-keeper counts his thousands, home brew counts its tens of thousands. To this subject there is a remarkable absence of attention on the part of the Anti-Saloon League and of the Prohibition enforcement service. They know that there are not hundreds of thousands but millions of people breaking the law by making their own liquors, but they dare not speak of it. They dare not go even so far as to make it universally known that the making of home brew *is* a violation of the law. To this day a very considerable number of people who indulge in the practice are unaware that it is a violation of the law. And the reason for this careful and persistent silence is only too plain. To make conspicuous before the whole American people the fact that the law is being steadily and complacently violated in millions of decent American homes would bring about a realization of the demoralizing effect of Prohibition

which its sponsors, fanatical as they are, very wisely shrink from facing.

How long this demoralization may last I shall not venture to predict. But it will not be overcome in a day; and it will not be overcome at all by means of exhortations. It is possible that enforcement will gradually become more and more efficient, and that the spirit of resistance may thus gradually be worn out. On the other hand it is also possible that means of evading the law may become more and more perfected by invention and otherwise, and that the melancholy and humiliating spectacle which we are now witnessing may be of very long duration. But in any case it has already lasted long enough to do incalculable and almost ineradicable harm. And for all this it is utterly idle to place the blame on those qualities of human nature which have led to the violation of the law. Of those qualities some are reprehensible and some are not only blameless but commendable. The great guilt is not that of the law-breakers but that of the law-makers. It is

childish to imagine that every law, no matter what its nature, *can* command respect. Nothing would be easier than to imagine laws which a very considerable number of perfectly well-meaning people would be glad to have enacted, but which if enacted it would be not only the right, but the duty, of sound citizens to ignore. I do not say that the Eighteenth Amendment falls into this category. But it comes perilously near to doing so, and thousands of the best American citizens think that it actually does do so. It has degraded the Constitution of the United States. It has created a division among the people of the United States comparable only to that which was made by the awful issue of slavery and secession. That issue was a result of deep-seated historical causes in the face of which the wisdom and patriotism of three generations of Americans found itself powerless. This new cleavage has been caused by an act of legislative folly unmatched in the history of free institutions. My hope—a distant and yet a sincere hope—is that the American peo-

ple may, in spite of all difficulties, be awakened to a realization of that folly and restore the Constitution to its traditional dignity by a repeal, sooner or later, of the monstrous Amendment by which it has been defaced.

CHAPTER III

DESTROYING OUR FEDERAL SYSTEM

THUS far I have been dealing with the wrong which the Prohibition Amendment commits against the vital principle of *any* national Constitution, the principle which alone justifies the idea of a Constitution—a body of organic law removed from the operation of the ordinary processes of popular rule and representative government. But reference was made at the outset to a wrong of a more special, yet equally profound, character.

The distinctive feature of our system of government is that it combines a high degree of power and independence in the several States with a high degree of power and authority in the national government. Time was when the dispute naturally arising in such a Federal Union, concerning the

line of division between these two kinds of power, turned on an abstract or legalistic question of State sovereignty. That abstract question was decided, once for all, by the arbitrament of arms in our great Civil War. But the decision, while it strengthened the foundations of the Federal Union, left unimpaired the individuality, the vitality, the self-dependence of the States in all the ordinary affairs of life. It continued to be true, after the war as before, that each State had its own local pride, developed its own special institutions, regulated the conduct of life within its boundaries according to its own views of what was conducive to the order, the well-being, the contentment, the progress, of its own people.

It has been the belief of practically all intelligent observers of our national life that this individuality and self-dependence of the States has been a cardinal element in the promotion of our national welfare and in the preservation of our national character. In a country of such vast extent and natural vari-

ety, a country developing with unparalleled rapidity and confronted with constantly changing conditions, who can say how great would have been the loss to local initiative and civic spirit, how grave the impairment of national concord and good will, if all the serious concerns of the American people had been settled for them by a central government at Washington? In that admirable little book, "Politics for Young Americans," Charles Nordhoff fifty years ago expounded in simple language the principles underlying our system of government. Coming to the subject of "Decentralization," he said:

> Experience has shown that this device [decentralization] is of extreme importance, for two reasons: First, it is a powerful and the best means of training a people to efficient political action and the art of self-government; and, second, it presents constant and important barriers to the encroachment of rulers upon the rights and liberties of the nation; every subdivision forming a stronghold of resistance by the people against unjust or wicked rulers.
>
> Take notice that any system of government is

excellent in the precise degree in which it naturally trains the people in political independence, and habituates them to take an active part in governing themselves. Whatever plan of government does this is good—no matter what it may be called; and that which avoids this is necessarily bad.

What Mr. Nordhoff thus set forth has been universally acknowledged as the cardinal merit of local self-government; and in addition to this cardinal merit it has been recognized by all competent students of our history that our system of self-governing States has proved itself of inestimable benefit in another way. It has rendered possible the trying of important experiments in social and governmental policy; experiments which it would have been sometimes dangerous, and still more frequently politically impossible, to inaugurate on a national scale. When these experiments have proved successful, State after State has followed the example set by one or a few among their number; when they have been disappointing in their results, the rest of the Union has profited by the warning. But,

highly important as is this aspect of State independence, the most essential benefits of it are the training in self-government which is emphasized in the above quotation from Mr. Nordhoff, and the adaptation of laws to the particular needs and the particular character of the people of the various States.

That modern conditions have inevitably led to a vast enlargement of the powers of the central government, no thinking person can deny. It would be folly to attempt to stick to the exact division of State functions as against national which was natural when the Union was first formed. The railroad, the telegraph, and the telephone, the immense development of industrial, commercial, and financial organization, the growth of interwoven interests of a thousand kinds, have brought the people of California and New York, of Michigan and Texas, into closer relations than were common between those of Massachusetts and Virginia in the days of Washington and John Adams. In so far as the process of centralization has been dictated

by the clear necessities of the times, it would be idle to obstruct it or to cry out against it. But, so far from this being an argument *against* the preservation of the essentials of local self-government, it is the strongest possible argument *in favor* of that preservation. With the progress of science, invention, and business organization, the power and prestige of the central government are bound to grow, the power and prestige of the State governments are bound to decline, under the pressure of economic necessity and social convenience; all the more, then, does it behoove us to sustain those essentials of State authority which are not comprised within the domain of those overmastering economic forces. If we do not hold the line where the line *can* be held, we give up the cause altogether; and it will be only a question of time when we shall have drifted into complete subjection to a centralized government, and State boundaries will have no more serious significance than county boundaries have now.

But if there is one thing in the wide world

the control of which naturally and preëminently belongs to the individual State and not to the central government at Washington, that thing is the personal conduct and habits of the people of the State. If it is right and proper that the people of New York or Illinois or Maryland shall be subjected to a national law which declares what they may or may not eat or drink—a law which they cannot themselves alter, no matter how strongly they may desire it—then there is no act of centralization whatsoever which can be justly objected to *as* an act of centralization. The Prohibition Amendment is not merely an *impairment* of the principle of self-government of the States; it constitutes an absolute *abandonment* of that principle. This does not mean, of course, an immediate abandonment of the *practice* of State self-government; established institutions have a tenacious life, and moreover there are a thousand practical advantages in State self-government which nobody will think of giving up. But the *principle,* I repeat, is abandoned altogether if we accept the Eighteenth

Amendment as right and proper; and if anybody imagines that the abandonment of the principle is of no practical consequence, he is woefully deluded. So long as the principle is held in esteem, it is always possible to make a stout fight against any particular encroachment upon State authority; any proposed encroachment must prove its claim to acceptance not only as a practical desideratum but as not too flagrant an invasion of State prerogatives. But with the Eighteenth Amendment accepted as a proper part of our system, it will be impossible to object to any invasion as more flagrant than that to which the nation has already given its approval.

A striking illustration of this has, curiously enough, been furnished in the brief time that has passed since the adoption of the Eighteenth Amendment. Southern Senators and Representatives and Legislaturemen who, forgetting all about their cherished doctrine of State rights, had fallen over themselves in their eagerness to fasten the Eighteenth Amendment upon the country, suddenly dis-

covered that they were deeply devoted to that doctrine when the Nineteenth Amendment came up for consideration. But nobody would listen to them. They professed—and doubtless some of them sincerely professed—to find an essential difference between putting Woman Suffrage into the Constitution and putting Prohibition into the Constitution. The determination of the right of suffrage was, they said, the most fundamental attribute of a sovereign State; national Prohibition did not strike at the heart of State sovereignty as did national regulation of the suffrage. But the abstract question of sovereignty has had little interest for the nation since the Civil War; and if we waive that abstract question, the Prohibition Amendment was an infinitely more vital thrust at the principle of State self-government. The Woman Suffrage Amendment was the assertion of a fundamental principle of government, and if it was an abridgment of sovereignty it was an abridgment of the same character as those embodied in the Constitution from the beginning; the

Prohibition Amendment brought the Federal Government into control of precisely those intimate concerns of daily life which, above all else, had theretofore been left untouched by the central power, and subject to the independent jurisdiction of each individual State. The South had eagerly swallowed a camel, and when it asked the country to strain at a gnat it found nobody to listen.

Our public men, and our leaders of opinion, frequently and earnestly express their concern over the decline of importance in our State governments, the lessened vigor of the State spirit. The sentiment is not peculiar to any party or to any section; it is expressed with equal emphasis and with equal frequency by leading Republicans and leading Democrats, by Northerners and Southerners. All feel alike that with the decay of State spirit a virtue will go out of our national spirit—that a centralized America will be a devitalized America. But when they discuss the subject, they are in the habit of referring chiefly to defects in administration; to neglect of duty

by the average citizen or perhaps by those in high places in business or the professions; to want of intelligence in the Legislature, etc. And for all this there is much reason; yet all this we have had always with us, and it is not always that we have had with us this sense of the decline of State spirit. For that decline the chief cause is the gradual, yet steady and rapid, extension of national power and lowering of the comparative importance of the functions of the State. However, the functions that still remain to the State—and its subdivisions, the municipalities and counties —are still of enormous importance; and, with the growth of public-welfare activities which are ramifying in so many directions, that importance *may* be far greater in the future. But what is to become of it if we are ready to surrender to the central government the control of our most intimate concerns? And what concern can be so intimate as that of the conduct of the individual citizen in the pursuit of his daily life? How can the idea of the State as an object of pride or as a source of author-

ity flourish when the most elementary of its functions is supinely abandoned to the custody of a higher and a stronger power? The Prohibition Amendment has done more to sap the vitality of our State system than could be done by a hundred years of misrule at Albany or Harrisburg or Springfield. The effects of that misrule are more directly apparent, but they leave the State spirit untouched in its vital parts. The Prohibition Amendment strikes at the root of that spirit, and its evil precedent, if unreversed, will steadily cut off the source from which that spirit derives its life.

CHAPTER IV

HOW THE AMENDMENT WAS PUT THROUGH

THERE has been a vast amount of controversy over the question whether a majority of the American people favored the adoption of the Eighteenth Amendment. There is no possible way to settle that question. Even future votes, if any can be had that may be looked upon as referendum votes, cannot settle it, whichever way they may turn out. If evidence should come to hand which indicates that a majority of the American people favor the retention of the Amendment now that it is an accomplished fact, this will not prove that they favored its adoption in the first place; it may be that they wish to give it a fuller trial, or it may be that they do not wish to go through the upheaval and disturbance of a fresh agitation of the question, or it may

be some other reason quite different from what was in the situation four years ago. On the other hand, if the referendum should seem adverse, this might be due to disgust at the lawlessness that has developed in connection with the Prohibition Amendment, or to a realization of the vast amount of discontent it has aroused, or to something else that was not in the minds of the majority when the Amendment was put through.

But really the question is of very little importance. From the standpoint of fundamental political doctrine, it makes no difference whether 40 million, or 50 million, or 60 million people out of a hundred million desired to put into the Constitution a provision which is an offense against the underlying idea of any Constitution, an injury to the American Federal system, an outrage upon the first principles both of law and of liberty. And if, instead of viewing the matter from the standpoint of fundamental political doctrine, we look upon it as a question of Constitutional procedure, it is again—though for a different

reason—a matter of little consequence whether a count of noses would have favored the adoption of the Amendment or not. The Constitution provides a definite method for its own amendment, and this method was strictly carried out—the Amendment received the approval of the requisite number of Representatives, Senators and State Legislatures; from the standpoint of Constitutional procedure the question of popular majorities has nothing to do with the case.

But from *every* standpoint the way in which the Eighteenth Amendment was actually put through Congress and the Legislatures has a great deal to do with the case. Prohibitionists constantly point to the big majority in Congress, and the promptness and almost unanimity of the approval by the Legislatures, as proof of an overwhelming preponderance of public sentiment in favor of the Amendment. It is proof of no such thing. To begin with, nothing is more notorious than the fact that a large proportion of the members of Congress and State Legislatures who voted

for the Prohibition Amendment were not themselves in favor of it. Many of them openly declared that they were voting not according to their own judgment but in deference to the desire of their constituents. But there is not the slightest reason to believe that one out of twenty of those gentlemen made any effort to ascertain the desire of a *majority* of their constituents; nor, for that matter, that they would have followed that desire if they had known what it was. What they were really concerned about was to get the support, or avoid the enmity, of those who held, or were supposed to hold, the balance of power. For that purpose a determined and highly organized body of moderate dimensions may outweigh a body ten times as numerous and ten times as representative of the community. The Anti-Saloon League was the power of which Congressmen and Legislaturemen alike stood in fear. Never in our political history has there been such an example of consummately organized, astutely managed, and unremittingly maintained intimidation; and

accordingly never in our history has a measure of such revolutionary character and of such profound importance as the Eighteenth Amendment been put through with anything like such smoothness and celerity.

The intimidation exercised by the Anti-Saloon League was potent in a degree far beyond the numerical strength of the League and its adherents, not only because of the effective and systematic use of its black-listing methods, but also for another reason. Weak-kneed Congressmen and Legislaturemen succumbed not only to fear of the ballots which the League controlled but also to fear of another kind. A weapon not less powerful than political intimidation was the *moral* intimidation which the Prohibition propaganda had constantly at command. That such intimidation should be resorted to by a body pushing what it regards as a magnificent reform is not surprising; the pity is that so few people have the moral courage to beat back an attack of this kind. Throughout the entire agitation, it was the invariable habit

of Prohibition advocates to stigmatize the anti-Prohibition forces as representing nothing but the "liquor interests." The fight was presented in the light of a struggle between those who wished to coin money out of the degradation of their fellow-creatures and those who sought to save mankind from perdition. That the millions of people who enjoyed drinking, to whom it was a cherished source of refreshment, recuperation, and sociability, had any stake in the matter, the agitators never for a moment acknowledged; if a man stood out against Prohibition he was not the champion of the millions who *enjoyed* drink, but the servant of the interests who *sold* drink. This preposterous fiction was allowed to pass current with but little challenge; and many a public man who might have stood out against the Anti-Saloon League's power over the ballot-box cowered at the thought of the moral reprobation which a courageous stand against Prohibition might bring down upon him.

Thus the swiftness with which the Prohi-

bition Amendment was adopted by Congress and by State Legislatures, and the overwhelming majorities which it commanded in those bodies, is no proof either of sincere conviction on the part of the lawmakers or of their belief that they were expressing the genuine will of their constituents. As for individual conviction, the personal conduct of a large proportion of the lawmakers who voted for Prohibition is in notorious conflict with their votes; and as for the other question, it has happened in State after State that the Legislature was almost unanimous for Prohibition when the people of the State had quite recently shown by their vote that they were either distinctly against it or almost evenly divided.

Of this kind of proceeding, Maryland presented an example so flagrant as to deserve special mention. Although popular votes in the State had, within quite a short time, recorded strong anti-Prohibition majorities, the Legislature rushed its ratification of the Eighteenth Amendment through in the very first days of its session; and this in face of the fact

that Maryland has always held strongly by State rights and cherished its State individuality, and that the leading newspapers of the State and many of its foremost citizens came out courageously and energetically against the Amendment. In these circumstances, nothing but a mean subserviency to political intimidation can possibly account for the indecent haste with which the ratification was pushed through. It is interesting to note a subsequent episode which casts a further interesting light on the matter, and tends to show that there are limits beyond which the whip-and-spur rule of the Anti-Saloon League cannot go. In the session of the present year, the Anti-Saloon League tried to get a State Prohibition enforcement bill passed. Although there was a great public protest, the bill was put through the lower House of the Legislature; but in the Senate it encountered resistance of an effective kind. The Senate did not reject the bill; but, in spite of bitter opposition by the Anti-Saloon League, it attached to the bill a referendum clause. With

that clause attached, the Anti-Saloon League ceased to desire the passage of the bill, and allowed it to be killed on its return to the lower House of the Legislature. Is this not a fine exhibition of the nature of the League's hold on legislation? And is there not abundant evidence that the whole of this Maryland story is typical of what has been going on throughout the country?

Charges are made that the Anti-Saloon League has expended vast sums of money in its campaigns; money largely supplied, it is often alleged, by one of the world's richest men, running into the tens of millions or higher. I do not believe that these charges are true. More weight is to be attached to another factor in the case—the adoption of the Amendment by Congress while we were in the midst of the excitement and exaltation of the war, and two million of our young men were overseas. Unquestionably, advantage *was* taken of this situation; there can be little doubt that the Eighteenth Amendment would have had much harder sledding at a normal

time. And it is right, accordingly, to insist that the Amendment was not subjected to the kind of discussion, nor put through the kind of test of national approval, which ought to precede any such permanent and radical change in our Constitutional organization. This is especially true because National Prohibition was not even remotely an issue in the preceding election, nor in any earlier one. All these things must weigh in our judgment of the moral weight to be attached to the adoption of the Eighteenth Amendment; but there is another aspect of that adoption which is more important.

The gravest reproach which attaches to that unfortunate act, the one which causes deepest concern among thinking citizens, does not relate to any incidental feature of the Prohibition manœuvres. The fundamental trouble lay in a deplorable absence of any general understanding of the seriousness of making a vital change in the Constitution—incomparably the most vital to which it has ever been subjected—and of the solemn responsibility

of those upon whom rested the decision to make or not to make that change. Even in newspapers in which one would expect, as a matter of course, that this aspect of the question would be earnestly impressed upon their readers, it was, as a rule, passed over without so much as a mention. And this is not all. One of the shrewdest and most successful of the devices which the League and its supporters constantly made use of was to represent the function of Congress as being merely that of *submitting* the question to the State Legislatures; as though the passage of the Amendment by a two-thirds vote of Congress did not necessarily imply approval, but only a willingness to let the sentiment of the several States decide. Of course, such a view is preposterous; of course, if such were the purpose of the Constitutional procedure there would be no requirement of a two-thirds vote.* But many members of Congress were glad enough

* This should be self-evident; but if there were any room for doubt, it would be removed by a reference to the language of Article V of the Constitution:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitu-

to take refuge behind this view of their duty, absurd though it was; and no one can say how large a part it played in securing the requisite two-thirds of House and Senate. Yet from the moment the Amendment was thus adopted by Congress, nothing more was heard of this notion of that body having performed the merely ministerial act of passing the question on to the Legislatures. On the contrary, the two-thirds vote (and more) was pointed to as conclusive evidence of the overwhelming support of the Amendment by the nation; the Legislatures were expected to get with alacrity into the band-wagon into which Congress had so eagerly climbed. Evidently, it would have been far more difficult to get the Eighteenth Amendment into the Constitution if the two-thirds vote of Congress had been the sole requirement for its adoption. Congressmen disposed to take their responsibility lightly,

tion" which shall be valid "when ratified by the Legislatures of three-fourths of the States."

Thus Congress does not *submit* an amendment, but *proposes* it; and it does this only when two-thirds of both Houses deem it *necessary*. The primary act of judgment is performed by Congress; what remains for the Legislatures is to ratify or not to ratify that act.

and yet not altogether without conscience, voted with the feeling that their act was not final, when they might otherwise have shrunk from doing what their judgment told them was wrong; and, the thing once through Congress, Legislatures hastened to ratify in the feeling that ratification by the requisite number of Legislatures was manifestly a foregone conclusion. Thus at no stage of the game was there given to this tremendous Constitutional departure anything even distantly approaching the kind of consideration that such a step demands. The country was jockeyed and stampeded into the folly it has committed; and who can say what may be the next folly into which we shall fall, if we do not awaken to a truer sense of the duty that rests upon every member of a law-making body—to decide these grave questions in accordance with the dictates of his own honest and intelligent judgment?

CHAPTER V

THE LAW MAKERS AND THE LAW

WELL-MEANING exhorters, shocked at the spectacle of millions of perfectly decent and law-abiding Americans showing an utter disregard of the Prohibition law, are prone to insist that to violate this law, or to abet its violation, is just as immoral as to violate any other criminal law. The thing is on the statute-books—nay, in the very Constitution itself—and to offend against it, they say, is as much a crime as to commit larceny, arson or murder. But they may repeat this doctrine until Doomsday, and make little impression upon persons who exercise their common sense. The law that makes larceny, arson or murder a crime merely registers, and emphasizes, and makes effective through the power of the Government, the dictates of the moral sense of practically all mankind; and if, in the case

of some kindred crimes, it goes beyond those dictates for special reasons, the extension is only such as is called for by the circumstances. However desirable it may be that the sudden transformation of an innocent act into a crime by mere governmental edict should carry with it the same degree of respect as is paid to laws against crimes which all normal men hold in abhorrence, it is idle to expect any such thing; and in a case where the edict violates principles which almost all of us only a short time ago held to be almost sacred, the expectation is worse than merely idle. A nation which could instantly get itself into the frame of mind necessary for such supine submission would be a nation fit for servitude, not freedom.

But in the case of the Prohibition Amendment, and of the Volstead act for its enforcement, there enters another element which must inevitably and most powerfully affect the feelings of men toward the law. Everybody knows that the law is violated, in spirit if not in letter, by a large proportion of the very

men who imposed it upon the country. Members of Congress and of the State Legislatures—those that voted for Prohibition, as well as those that voted against it—have their private stocks of liquor like other people; nor is there any reason to believe that many of them are more scrupulous than other people in augmenting their supply from outside sources. One of the means resorted to by the Anti-Saloon League in pushing through the Amendment was the particular care they took to make its passage involve little sacrifice of personal indulgence on the part of those who were wealthy enough, or clever enough, to provide for the satisfaction of their own desires in the matter of drink, at least for many years to come. The League knew perfectly that in some Prohibition States the *possession* of liquor was forbidden as well as its manufacture, transportation and sale; but the Anti-Saloon League would never have dared to include in the Amendment a ban upon *possession*. Congressmen who voted for it knew that not only they themselves, but their

wealthy and influential constituents, would be in a position to provide in very large measure for their own future indulgences; and it may be set down as certain that had this not been the case, opposition to the Amendment would have been vastly more effective than it was.

In order that a person should entertain a genuine feeling that the Prohibition Amendment is entitled to the same kind of respect as the general body of criminal law, it is necessary—even if he waives all those questions of Constitutional principle which have been dwelt upon in previous chapters—that he should regard *drinking* as a crime. And this is indeed the express belief of many upholders of the Amendment—a foolish belief, in my judgment, but certainly a sincere one. I have before me a letter—typical of many—published in one of our leading newspapers and written evidently by a man of education as well as sincerity. He speaks bitterly of the proposal to permit "light wines and beer," and asks whether any one would propose to permit light burglary or light arson. That man

evidently regards indulgence in any intoxicating liquor as a crime, and he looks upon the law as a prohibition of that crime. And he is essentially right, if the law is right. For while the law does not in its express terms make drinking a crime, its intention—and its practical effect so far as regards the great mass of the people—is precisely that. The people President Angell had in mind when he implored the young Yale graduates not to be like them, are not makers or sellers of liquor, but drinkers of it. They are not moonshiners or smugglers or bootleggers; they are the people upon whose patronage or connivance the moonshiners and smugglers and bootleggers depend for their business. And everybody knows that, in their private capacity, Senators and Representatives and Legislaturemen are precisely like their fellow-citizens in this matter. They may possibly be somewhat more careful about the letter of the law; they are certainly just as regardless of its spirit. With the exception of a comparatively small number of genuine Prohibitionists—men who

were for Prohibition before the Anti-Saloon League started its campaign—they would laugh at the question whether they regard drinking as a crime. And they act accordingly.

What degree of moral authority can the law be expected to have in these circumstances? Upon the mind of a man intensely convinced that the law is an outrage, how much impression can be produced by the mere fact that it was passed by Congress and the Legislatures, when the real attitude of the members of those bodies is such as it is seen to be in their private conduct? How much of a moral sanction would be given to a law against larceny if a large proportion of the men who enacted the law were themselves receivers of stolen goods? Or a law against forgery if the legislators were in the frequent habit of passing forged checks? It happens that the receiving of stolen goods or the passing of forged checks is a crime under the law, as well as the stealing or the forgery itself; and that the Prohibition law does not make

the drinking or even the buying of liquor, but only the making or selling of it, a crime; but what a miserable refuge this is for a man who professes to believe that the abolition of intoxicating liquor is so supreme a public necessity as to demand the remaking of the Constitution of the United States for the purpose! Not the least of the causes of public disrespect for the Prohibition law is the notorious insincerity of the makers of the law, and their flagrant disrespect for their own creation.

CHAPTER VI

THE LAW ENFORCERS AND THE LAW

DAY after day, month after month, a distressing, a disgusting spectacle is presented to the American people in connection with the enforcement of the national Prohibition law. No day passes without newspaper headlines which "feature" some phase of the contest going on between the Government on the one hand and millions of citizens on the other; citizens who belong not to the criminal or semi-criminal classes, nor yet to the ranks of those who are indifferent or disloyal to the principles of our institutions, but who are typical Americans, decent, industrious, patriotic, law-abiding. It is true that the individuals whom the Government hunts down by its spies, its arrests, its prosecutions, are men who make a business of breaking the Prohibition

law, and most of whom would probably just as readily break other laws if money was to be made by it. But none the less the real struggle is not with the thousands who furnish liquor but with the hundreds of thousands, or millions, to whom they purvey it. Every time we read of a spectacular raid or a sensational capture, we are really reading of a war that is being waged by a vast multitude of good normal American citizens against the enforcement of a law which they regard as a gross invasion of their rights and a violation of the first principles of American government. The state of things thus arising was admirably and compactly characterized by Justice Clarke, of the United States Supreme Court, in a single sentence of his recent address before the Alumni of the New York University Law School, as follows:

> The Eighteenth Amendment required millions of men and women to abruptly give up habits and customs of life which they thought not immoral or wrong, but which, on the contrary, they believed to be necessary to their reasonable com-

fort and happiness, and thereby, as we all now see, respect not only for that law, but for all law, has been put to an unprecedented and demoralizing strain in our country, the end of which it is difficult to see.

Upon all this, however, as concerned with the conduct of the people at large, perhaps enough has been said in previous chapters. What I wish to dwell upon at this point is the conduct of those who, either in the Government itself, or in the power behind the Government—the Anti-Saloon League—are carrying on the enforcement of the Prohibition law. They are not carrying it on in the way in which the enforcement of other laws is carried on. In the case of a normal criminal law—and it must always be remembered that the Volstead act is a criminal law, just like the laws against burglary, or forgery, or arson—those who are responsible for its enforcement regard themselves as administrators of the law, neither more nor less. But the enforcement of the Prohibition law is something quite different: it is not a work of

administration but of strategy; not a question of seeing that the law is obeyed by everybody, but of carrying on a campaign against the defiers of the law just as one would carry on a campaign against a foreign enemy. The generals in charge of the campaign decide whether they shall or shall not attack a particular body of the enemy; and their decision is controlled by the same kind of calculation as that made by the generals in a war of arms—a calculation of the chances of victory. Where the enemy is too numerous, or too strongly entrenched, or too widely scattered, they leave him alone; where they can drive him into a corner and capture him, they attack.

To realize how thoroughly this policy is recognized as a simple fact, one can hardly do better than quote these perfectly naïve and sincere remarks in an editorial entitled "Government Bootlegging," in the New York *Tribune,* a paper that has never been unfriendly to the Eighteenth Amendment:

> That American ships had wine lists was no news to the astute Wayne B. Wheeler, generalissimo

of the Prohibition forces. He was fully informed before Mr. Gallivan spoke, and by silence gave consent to them. He was complaisant, it may be assumed, because he did not wish to furnish another argument to those who would repeal or modify the Volstead act. He has made no fuss over home brew and has allowed ruralists to make cider of high alcoholic voltage. He saw it would be difficult, if not impossible, to stop home manufacture and did not wish to swell the number of anti-Volsteaders. He was looking to securing results rather than to being gloriously but futilely consistent.

Similarly the practical Mr. Wheeler foresaw that if American ships were bone-dry the bibulous would book on foreign ships and the total consumption of beverages would not be materially diminished. For a barren victory he did not care to have Volsteadism carry the blame of driving American passenger ships from the sea. Prohibitionists who have not put their brains in storage may judge whether or not his tactics are good and contribute to the end he seeks.

Now from the standpoint of pure calculation directed to the attainment of a strategic end, in a warfare between the power of a Government and the forces of a very large proportion of the population over which it holds sway,

the *Tribune* may be entirely right. But what is left of the idea of respect for law? With what effectiveness can either President Angell or President Harding appeal to that sentiment when it is openly admitted that the Government not only deliberately *overlooks* violations of the law by millions of private individuals, but actually *directs* that the law shall be violated on its own ships, for fear that the commercial loss entailed by doing otherwise would further excite popular resentment against the law? It has only to be added that since the date of that editorial (June 18, 1922) the Anti-Saloon League has come out strongly against the selling of liquor on Government-owned ships—a change which only emphasizes the point I am making. For, in spite of the *Tribune's* shrewd observations, it soon became clear that the Volstead act was being so terribly discredited by the preposterous spectacle of the Government selling liquor on its own ships that something had to be done about it; and it was only under the pressure of this situation that a new line of strategy was

adopted by the Anti-Saloon League. What it will do if it finds that it cannot put through its plan of excluding liquor from *all* ships, American and foreign, remains to be seen.

Now it may be replied to all this that a certain amount of laxity is to be found in the execution of all laws; that the resources at the disposal of government not being sufficient to secure the hunting down and punishment of all offenders, our executive and prosecuting officers and police and courts apply their powers in such directions and in such ways as to accomplish the nearest approach possible to a complete enforcement of the law. But the reply is worthless. Because the enforcement of all laws is in some degree imperfect, it does not follow that there is no disgrace and no mischief in the spectacle of a law enforced with spectacular vigor, and even violence, in a thousand cases where such enforcement cannot be successfully resisted, and deliberately treated as a dead letter in a hundred thousand cases where its enforcement would show how widespread and intense is the people's disap-

proval of the law. There are many instances in which a law has become a dead letter; where this is generally recognized no appreciable harm is done, since universal custom operates as a virtual repeal. But here is a case of a law enforced with militant energy where it suits the officers of the Government to enforce it, systematically ignored in millions of cases by the same officers because it suits them to do that, and cynically violated by the direct orders of the Government itself when this course seems recommended by a cold-blooded calculation of policy! If the laws against larceny, or arson, or burglary, or murder, were executed in this fashion, what standing would the law have in anybody's mind? Yet in the case of these crimes, the law only makes effective the moral code which substantially the whole of the community respects as a fundamental part of its ethical creed; and accordingly even if the law were administered in any such outrageous fashion as is the case with Prohibition, it would still retain in large measure its moral authority.

But in the case of the Prohibition law, an enormous minority, and very possibly a majority, of the people regard the thing it forbids as perfectly innocent and, within proper limits, eminently desirable; the only moral sanction that it has in their minds is that of its being on the statute books. What can that moral sanction possibly amount to when the administration of the law itself furnishes the most notorious of all examples of disrespect for its commands?

There is another aspect of the enforcement of the law which invites comment, but upon which I shall say only a few words. I refer to the many invasions of privacy, unwarranted searches, etc., that have taken place in the execution of the law. If this went on upon a much larger scale than has actually been the case, it would justly be the occasion for perhaps the most severe of all the indictments against the Volstead act; for it would mean that Americans are being habituated to indifference in regard to the violation of one of their most ancient and most essential rights.

But in fact the danger of public resentment over such a course has been the chief cause of the sagacious strategy which has characterized the policy of the Government; or perhaps one should rather say, the Anti-Saloon League, for it is the League, and not the Government, that is the predominant partner in this matter. For the present, the League has been "lying low" in the matter of search and seizure; but if it should ever feel strong enough to undertake the suppression of home brew, there is not the faintest question but that it will press forward the most stringent conceivable measures of search and seizure. Accordingly, there opens up before the eyes of the American people this pleasing prospect: If the present struggle of the League (or the Government) with bootleggers and moonshiners and smugglers is brought to a successful conclusion, there will naturally be a greater resort than ever to home manufacture; and equally naturally, it will then be necessary for the League (or the Government) to undertake to stamp out that practice. But ob-

viously this cannot be done without inaugurating a sweeping and determined policy of search and seizure in private houses; a beautiful prospect for "the land of the free," for the inheritors of the English tradition of individual liberty and of the American spirit of '76—a sight for gods and men to weep over or laugh at!

CHAPTER VII

NATURE OF THE PROHIBITIONIST TYRANNY

THAT there are some things which, however good they may be in themselves, the majority has no right to impose upon the minority, is a doctrine that was, I think I may say, universally understood among thinking Americans of all former generations. It was often forgotten by the unthinking; but those who felt themselves called upon to be serious instructors of public opinion were always to be counted on to assert it, in the face of any popular clamor or aberration. The most deplorable feature, to my mind, of the whole story of the Prohibition amendment, was the failure of our journalists and leaders of opinion, with a few notable exceptions, to perform this duty which so peculiarly devolves upon them.

Lest any reader should imagine that this

doctrine of the proper limits of majority power is something peculiar to certain political theorists, I will quote just one authority —where I might quote scores as well—to which it is impossible to apply any such characterization. It ought, of course, to be unnecessary to quote any authority, since the Constitution itself contains the clearest possible embodiment of that doctrine. In the excellent little book of half a century ago referred to in a previous chapter, Nordhoff's "Politics for Young Americans," the chapter entitled "Of Political Constitutions" opens as follows:

A political Constitution is the instrument or compact in which the rights of the people who adopt it, and the powers and responsibilities of their rulers, are described, and by which they are fixed.

The chief object of a Constitution is to limit the power of majorities.

A moment's reflection will tell you that mere majority rule, unlimited, would be the most grinding of tyrannies; the minority at any time would be mere slaves, whose rights to life, prop-

erty and comfort no one who chose to join the majority would be bound to respect.

All this is stated, and the central point put in italics, by Mr. Nordhoff, as matter that must be impressed upon young people just beginning to think about public questions, and not at all as matter of controversy or doubt. The last sentence, to be sure, requires amplification; Mr. Nordhoff certainly did not intend his young readers to infer that such tyranny as he describes is either sure to occur in the absence of a Constitution or sure to be prevented by it. The primary defense against it is in the people's own recognition of the proper limits of majority power; what Mr. Nordhoff wished to impress upon his readers is the part played by a Constitution in fixing that recognition in a strong and enduring form.

The quotation I have in mind, however, from one of the highest of legal authorities, has no reference to the United States Constitution or to any Constitution. It deals with

the essential principles of law and of government. It is from a book by the late James C. Carter, who was beyond challenge the leader of the bar of New York, and was also one of the foremost leaders in movements for civic improvement. The book bears the title "Law: its Origin, Growth and Function," and consists of a course of lectures prepared for delivery to the law school of Harvard University seventeen years ago; which, it is to be noted, was before the movement for National Prohibition had got under way. Mr. Carter was not arguing for any specific object, but was impressing upon the young men general truths that had the sanction of ages of experience, and were the embodiment of the wisest thought of generations. Let us hear a few of these truths as he laid them down:

Nothing is more attractive to the benevolent vanity of men than the notion that they can effect great improvement in society by the simple process of forbidding all wrong conduct, or conduct which they think is wrong, by law, and of enjoin-

ing all good conduct by the same means. (p. 221)

The principal danger lies in the attempt often made to convert into crimes acts regarded by large numbers, perhaps a majority, as innocent —that is to practise what is, in fact, tyranny. While all are ready to agree that tyranny is a very mischievous thing, there is not a right understanding equally general of what tyranny is. Some think that tyranny is a fault only of despots, and cannot be committed under a republican form of government; they think that the maxim that the majority must govern justifies the majority in governing as it pleases, and requires the minority to acquiesce with cheerfulness in legislation of any character, as if what is called self-government were a scheme by which different parts of the community may alternately enjoy the privilege of tyrannizing over each other. (p. 246)

Speaking in particular of the evil effects of that particular "species of criminal legislation to which sumptuary laws belong," Mr. Carter, after dwelling upon the subject in detail, says:

An especially pernicious effect is that society becomes divided between the friends and the foes

of repressive laws, and the opposing parties become animated with hostility which prevents united action for purposes considered beneficial by both. Perhaps the worst of all is that the general regard and reverence for law are impaired, a consequence the mischief of which can scarcely be estimated (p. 247).

To prevent consequences like these, springing as they do from the most deep-seated qualities of human nature, by pious exhortations is a hopeless undertaking. But if it be so in general—if the consequences of majority tyranny in the shape of repressive laws governing personal habits could be predicted so clearly upon general principles—how vastly more certain and more serious must these consequences be when such a law is fastened upon the people by means that would be abhorrent even in the case of any ordinary law! The people who object to Prohibition are exultantly told by their masters that it is idle for them to think of throwing off their chains; that the law is riveted upon them by the Constitution, and the possibility of repeal is too remote for practical consideration. Thus the

one thought that might mitigate resentment and discountenance resistance, the thought that freedom might be regained by repeal, is set aside; and the result is what we have been witnessing.

On this phase of the subject, however, enough has been said in a previous chapter. What I wish to point out at present is some peculiarities of National Prohibition which make it a more than ordinarily odious example of majority tyranny.

National Prohibition in the United States —granting, for the sake of argument, that it expresses the will of a majority—is not a case merely of a greater number of people forcing their standards of life upon a smaller number, in a matter in which such coercion by a majority is in its nature tyrannical. The population of the United States is, in more than one respect, composed of parts extremely diverse as regards the particular subject of this legislation. The question of drink has a totally different aspect in the South from what it has in the North; a totally different aspect in the

cities from what it has in the rural districts or in small towns; to say nothing of other differences which, though important, are of less moment. How profoundly the whole course of the Prohibition movement has been affected by the desire of the South to keep liquor away from the negroes, needs no elaboration; it would not be going far beyond the truth to say that the people of New York are being deprived of their right to the harmless enjoyment of wine and beer in order that the negroes of Alabama and Texas may not get beastly drunk on rotgut whiskey. If the South had stuck to its own business and to its traditional principle of State autonomy—a principle which the South invokes as ardently as ever when it comes to any other phase of the negro question—there would never have been a Prohibition Amendment to the Constitution of the United States; and at the same time the South would have found it perfectly possible to deal effectively with its own drink problem by energetic execution of its own laws, made possible by its own public opinion.

Nor is the case essentially different as regards the West; the very people who are loudest in their shouting for the Eighteenth Amendment are also most emphatic in their praises of what Kansas accomplished by enforcing her own Prohibition law. Thus the Prohibitionist tyranny is in no small measure a sectional tyranny, which is of course an aggravated form of majority tyranny.

But what needs insisting on even more than this is the way in which the country districts impose their notions about Prohibition upon the people of the cities, and especially of the great cities. When attention is called to the wholesale disregard of the law, contempt for the law, and hostility to the law which is so manifest in the big cities, the champions of Prohibition in the press—including the New York press—never tire of saying that it is only in New York and a few other great cities that this state of things exists. But everybody knows that the condition exists not only in "a few," but in practically all, of our big cities; and for that matter that it exists in a

large proportion of all the cities of the country, big and little. But if we confine ourselves only to the 34 cities having a population of 200,000 or more, we have here an aggregate population of almost exactly 25,000,000—nearly one-fourth of the entire population of the country. Is it a trifling matter that these great communities, this vast population of large-city dwellers, should have their mode of life controlled by a majority rolled up by the vote of people whose conditions, whose advantages and disadvantages, whose opportunities and mode of life, and consequently whose desires and needs, are of a wholly different nature? Could the tyranny of the majority take a more obnoxious form than that of sparse rural populations, scattered over the whole area of the country from Maine to Texas and from Georgia to Oregon, deciding for the crowded millions of New York and Chicago that they shall or shall not be permitted to drink a glass of beer?

Nor is it only the obvious tyranny of such a régime that makes it so unjustifiable. There

are some special features in the case which accentuate its unreasonableness and unfairness. In the American village and small town, the use of alcoholic drinks presents almost no good aspect. The countryman sees nothing but the vile and sordid side of it. The village grogshop, the bar of the small-town hotel, in America has presented little but the gross and degrading aspect of drinking. Prohibition has meant, to the average farmer, the abolition of the village groggery and the small-town barroom. That it plays a very different part in the lives of millions of city people—and for that matter that it does so in the lives of millions of industrial workers in smaller communities—is a notion that never enters the farmer's mind. And to this must be added the circumstance that the farmer can easily make his own cider and other alcoholic drinks, and feels quite sure that Prohibition will never seriously interfere with his doing so. Altogether, we have here a case of one element of the population decreeing the mode of life of another element

of whose circumstances and desires they have no understanding, and who are affected by the decree in a wholly different way from that in which they themselves are affected by it.

Many other points might be made, further to emphasize the monstrosity of the Prohibition that has been imposed upon our country. Of these perhaps the most important one is the way in which the law operates so as to be effective against the poor, and comparatively impotent against the rich. But this and other points have been so abundantly brought before the public in connection with the news of the day that it seemed hardly necessary to dwell upon them. My object has been rather to direct attention to a few broad considerations, less generally thought of. The objection that applies to sumptuary laws in general has tenfold force in the case of National Prohibition riveted down by the Constitution, and imposed upon the whole nation by particular sections and by particular elements of the population.

A question of profound interest in connec-

tion with this aspect of Prohibition demands a few words of discussion. It has been asserted with great confidence, and denied with equal positiveness, that Prohibition has had the effect of very greatly increasing the addiction to narcotic drugs. I confess my inability to decide, from any data that have come to my attention, which of these contradictory assertions is true. But it is not denied by anybody, I believe, that, whether Prohibition has anything to do with the case or not, the use of narcotic drugs in this country is several times greater per capita than it is in any of the countries of Europe—six or seven times as great as in most. Why this should be so, it is perhaps not easy to determine. The causes may be many. But I submit that it is at least highly probable that one very great cause of this extraordinary and deplorable state of things is the atmosphere of reprobation which in America has so long surrounded the practice of moderate drinking. Any resort whatever to alcoholic drinks being held by so large a proportion of the persons who are most

influential in religious and educational circles to be sinful and incompatible with the best character, it is almost inevitable that, in thousands of cases, desires and needs which would find their natural satisfaction in temperate and social drinking are turned into the secret and infinitely more unwholesome channel of drug addiction. How much of the extraordinary extent of this evil in America may be due to this cause, I shall of course not venture to estimate; but that it is a large part of the explanation, I feel fairly certain. And my belief that it is so is greatly strengthened by the familiar fact that in the countries in which wine is cheap and abundant, and is freely used by all the people, drunkenness is very rare in comparison with other countries. As easy and familiar recourse to wine prevents resort to stronger drinks, so it seems highly probable that the practice of temperate drinking would in thousands of cases obviate the craving for drugs. But when all drinking, temperate and intemperate, is alike put under the ban, the temptation to secret indulgence in drugs gets

a foothold; and that temptation once yielded to, the downward path is swiftly trodden.

Finally, there is a broad view of the whole subject of the relation of Prohibition to life, which these last reflections may serve to suggest. When a given evil in human life presents itself to our consideration, it is a natural and a praiseworthy impulse to seek to effect its removal. To that impulse is owing the long train of beneficent reforms which form so gratifying a feature of the story of the past century and more. But that story would have been very different if the reformer had in every instance undertaken to extirpate whatever he found wrong or noxious. To strike with crusading frenzy at what you have worked yourself up into believing is wholly an accursed thing is a tempting short cut, but is fraught with the possibility of all manner of harm. In the case of Prohibition, I have endeavored to point out several of the forms of harm which it carries with it. But in addition to those that can so plainly be pointed out, there is a broader if less definite one.

When we have choked off a particular avenue of satisfaction to a widespread human desire; when, foiled perhaps in one direction, we attack with equal fury the possibility of escape in another and another; who shall assure us that, debarred of satisfaction in old and tried ways, the same desires will not find vent in far more injurious indulgences? How different if, instead of crude and wholesale compulsion, resort were had—as it had been had before the Prohibitionist mania swept us off our feet—to well-considered measures of regulation and restriction, and to the legitimate influences of persuasion and example! The process is slower, to be sure, but it had accomplished wonderful improvement in our own time and before; what it gained was solid gain; and it did not invite either the resentment, the lawlessness, or the other evils which despotic prohibition of innocent pleasure carries in its train.

CHAPTER VIII

ONE-HALF OF ONE PER CENT.

THE Eighteenth Amendment forbids "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

The Volstead act declares that the phrase "intoxicating liquor," as used in the act, "shall be construed to include 'all liquors' containing one-half of one percentum or more of alcohol by volume which are fit for use for beverage purposes."

Since everybody knows that a drink containing one-half of one per cent. of alcohol is not in fact an intoxicating drink, a vast amount of indignation has been aroused, among opponents of National Prohibition, by this

stretching of the letter of the Amendment. I have to confess that I cannot get excited over this particular phase of the Volstead legislation. There is, to be sure, something offensive about persons who profess to be peculiarly the exponents of high morality being willing to attain a practical end by inserting in a law a definition which declares a thing to be what in fact it is not; but the offense is rather one of form than of really important substance. The Supreme Court has decided that Congress did not exceed its powers in making this definition of "intoxicating liquor"; and, while this does not absolve the makers of the law of the offense against strict truthfulness, it may rightly be regarded as evidence that the transgression was not of the sort that constituted a substantial usurpation—the assumption by Congress of a power lying beyond the limits of the grant conferred upon it by the Eighteenth Amendment. If Congress chooses to declare one-half of one per cent. as its notion of the kind of liquor beyond which there would occur a transgression of the Eighteenth

Article of the Amendments to the Constitution, says the Supreme Court in effect, it may do so in the exercise of the power granted to it "to enforce this Article by appropriate legislation."

Not a little effort has been expended by lawyers and legislators—State and national—upon the idea of bringing about a raising of the permitted percentage to 2.75. That figure appears to represent quite accurately the point at which, as a matter of fact, an alcoholic liquor becomes—in any real and practical sense—in the slightest degree intoxicating. But, except for the purpose of making something like a breach in the outer wall of the great Prohibition fortress—the purpose of showing that the control of the Prohibitionist forces over Congress or a State Legislature is not absolutely unlimited—this game is not worth the candle. To fight hard and long merely to get a concession like this, which is in substance no concession—to get permission to drink beer that is not beer and wine that is not wine—is surely not an undertaking worth

the expenditure of any great amount of civic energy.

A source of comfort was, however, furnished to advocates of a liberalizing of the Prohibition régime by the very fact that the Supreme Court *did* sanction so manifest a stretching of the meaning of words as is involved in a law which declares any beverage containing as much as one-half of one per cent. of alcohol to be an "intoxicating liquor." If a liquor that is *not* intoxicating can by Congressional definition be made intoxicating, it was pointed out, then by the same token a liquor that *is* intoxicating can by Congressional definition be made non-intoxicating. Accordingly, it has been held by many, if Congress were to substitute ten per cent., say, for one-half of one per cent., in the Volstead act, by which means beer and light wines would be legitimated, the Supreme Court would uphold the law and a great relief from the present oppressive conditions would by this very simple means be accomplished.

What the Supreme Court would actually

say of such a law I am far from bold enough to attempt to say. That the law would not be an execution of the intent of the Eighteenth Amendment is plain enough; and it would be a much more substantial transgression against its purpose than is the one-half of one per cent. enactment. Nevertheless it is quite possible that the Supreme Court would decide that this deviation to the right of the zero mark is as much within the discretion of Congress as was the Volstead deviation to the left. Certainly the possibility at least exists that this would be so.

But whether this be so or not, it is quite plain that Congress, if it really wishes to do so, can put the country into the position where Prohibition will either draw the line above the beer-and-wine point or go out altogether. For if it were to pass an act repealing the Volstead law, and in a separate act, passed practically at the same time but *after* the repealing act, enact a ten per cent. prohibition law (or some similar percentage) what would be the result? Certainly there is nothing un-

constitutional in repealing the Volstead act. There would have been nothing unconstitutional in a failure of Congress to pass *any* act enforcing the Eighteenth Amendment. The Supreme Court can put *out of action* a law that Congress *has* passed, on the ground of unconstitutionality; but it cannot put *into action* a law that Congress has *not* passed. And a law repealed is the same as a law that has not been passed. Thus if Congress really wished to legitimate beer and wine, it could do so; leaving it to the Supreme Court to declare whether a law prohibiting strong alcoholic drinks was or was not more of an enforcement of the Eighteenth Amendment than no law at all—for the only alternative the Court would have before it would be that law or nothing!

I do not say that I favor this procedure; for it would certainly not be an honest fulfilment of the requirements of the Eighteenth Amendment. To have a law which professes to carry out an injunction of the Constitution but which does not do so is a thing to be

deplored. But is it more to be deplored than to have a law which in its terms does carry out the injunction of the Constitution but which in its actual operation does no such thing? A law to the violation of which in a vast class of instances—the millions of instances of home brew—the Government deliberately shuts its eyes? A law the violation of which in the class of instances in which the Government *does* seriously undertake to enforce it—bootlegging, smuggling and moonshining—is condoned, aided and abetted by hundreds of thousands of our best citizens?

It is, as I have said in an early chapter, a choice of evils; and it is not easy to decide between them. On the one hand, we have the disrespect of the Constitution involved in the enactment by Congress of a law which it knows to be less than a fulfilment of the Constitution's mandate. On the other hand we have the disrespect of the law involved in its daily violation by millions of citizens who break it without the slightest compunction or sense of guilt, and in the deliberate failure

of the Government to so much as take cognizance of the most numerous class of those violations. In favor of the former course—the passing of a wine-and-beer law—it may at least be said that the offense, whether it be great or small, is committed once for all by a single action of Congress, which, if left undisturbed, would probably before long be generally accepted as taking the place of the Amendment itself. A law permitting wine and beer but forbidding stronger drinks would have so much more public sentiment behind it than the present law that it would probably be decently enforced, and not very widely resisted; and though such a law would be justly objected to as not an honest fulfilment of the Eighteenth Amendment, it would, I believe, in its practical effect, be far less demoralizing than the existing statute, the Volstead act. Accordingly, while I cannot view the enactment of such a law with unalloyed satisfaction, I think that, in the situation into which we have been put by the Eighteenth Amendment, the proposal of a wine-and-beer law to

displace the Volstead law deserves the support of good citizens as a practical measure which would effect a great improvement on the present state of things.

CHAPTER IX

PROHIBITION AND LIBERTY

LIBERTY is not to-day the watchword that it was a hundred years ago, or fifty years ago, or thirty years ago. Though there may be much doubt as to the causes of the change, it must be admitted as a fact that the feeling that liberty is in itself one of the prime objects of human desire, a precious thing to be struggled for when denied and to be jealously defended when possessed, has not so strong a hold on men's minds at this time as it had in former generations.

Some of the chief reasons for this change are not, however, far to seek. In the tremendous movement, political and economic, that has marked the past hundred years, three ideas have been dominant—democracy, efficiency, humanitarianism. None of these

three ideas is inherently bound up with the idea of liberty; and indeed each one of the three contains the seed of marked hostility to the idea of liberty. This is more true, and more obviously true, of efficiency and of humanitarianism than it is of democracy; but it is true in no small measure of democracy also. For people intent upon the idea that government must be democratic—that is, must reflect the will of the majority—naturally concentrate upon the effort to organize the majority and increase its power; a process which throws into the shade regard for individual rights and liberties, and even tends to put them somewhat in the light of obstacles to the great aim. Furthermore, the democratic movement has set for itself objects beyond the sphere of government; and in the domain of economic control, democracy—if that is the right word for it—must strive for collective power, as distinguished from individual liberty, even more intently than in the field of government.

However, in the case of democracy, there is

at least no *inherent opposition* to liberty; such opposition as develops out of it may be regarded as comparatively accidental. Not so with efficiency or humanitarianism. Even here, however, I feel that a word of warning is necessary. I am not speaking of the highest and truest efficiency, or of the most far-sighted and most beneficent humanitarianism. I am speaking of efficiency as understood in the common use of the term as a label; and I am speaking of humanitarianism as represented by the attitude and the mental temper of nearly all of the excellent men and women who actually represent that cause and who devote their lives to the problems of social betterment.

To the efficiency expert and to his multitude of followers, the immediate increase of productivity is so absorbing an object that if it has been attained by a particular course of action, the question whether its attainment has involved a sacrifice of liberty seems to his mind absolutely trivial. Of course this would not be so if the sacrifice were of a startling

nature; but short of something palpably galling, something grossly offensive to the primary instincts of freemen, he simply doesn't understand how any person of sense can pretend to be concerned about it, in the face of demonstrated success from the efficiency standpoint.

What is true of the apostle of efficiency, and his followers, is even more emphatically true of the humanitarian. And, difficult as many people find it to stand out against the position of the efficiency advocate, it is far more difficult to dissent from that of the devotee of humanitarianism. In the case of the first, one has to brace up one's intellect to resist a plausible and enticing doctrine; in the case of the second, one must, in a sense, harden one's heart as well as stiffen one's mind. For here one has to deal not with a mere calculation of a general increase of prosperity or comfort, but with the direct extirpation of vice and misery which no decent person can contemplate without keen distress. If the humanitarian finds the principle of liberty

thrust in the way of his task of healing and rescue, he will repel with scorn the idea that any such abstraction should be permitted to impede his work of salvation; and—especially if the idea of liberty has, through other causes, suffered a decline from its once high authority—he will find multitudes ready to share his indignation. And he will find still greater multitudes who do not share his indignation, and in their hearts feel much misgiving over the invasion of liberty, but who are without the firmness of conviction, or without the moral courage, necessary to the assertion of principle when such assertion brings with it the danger of social opprobrium. The leaders in humanitarian reforms, and their most active followers, are, as a rule, men and women of high moral nature, and whether wise or unwise, broad-minded or narrow and fanatical, are justly credited with being actuated by a good motive; unfortunately, however, these attributes rarely prevent them from making reckless statements as to the facts of the matter

with which they are dealing, nor from indulging in calumnious abuse of those who oppose them. Hence thousands of persons really averse to their programme give tacit or lukewarm assent to it rather than incur the odium which outspoken opposition would invite; and accordingly, true though it is that the idea of liberty is not cherished so ardently or so universally as in a former day, the decline into which it has fallen in men's hearts and minds is by no means so great as surface indications make it seem. On the one hand, the efficiency people and the professional humanitarians are, like all reformers and agitators, abnormally vocal; and on the other hand the lovers of the old-fashioned principle of liberty are abnormally silent, so far as any public manifestation is concerned.

In the foregoing I have admitted, I think, as great a decline in the current prestige of the idea of liberty as would be claimed by the most enthusiastic efficiency man or the most ardent humanitarian. I now wish to insist

upon the other side of the matter. Persons who are always ready to be carried away with the current—and their name is legion—constantly make the mistake of imagining that the latest thing is the last. They are the first to throw aside old and venerable notions as outworn; they look with condescending pity upon those who are so dull as not to recognize the infinite potency of change; and yet, curiously enough, they never think of the possibility of a change which may reverse the current of to-day just as the current of to-day has reversed that of yesterday. The tree of liberty is less flourishing to-day than it was fifty or a hundred years ago; its leaves are not so green, and it is not so much the object of universal admiration and affection. But its roots are deep down in the soil; and it supplies a need of mankind too fundamental, feeds an aspiration too closely linked with all that elevates and enriches human nature, to permit of its being permanently neglected or allowed to fall into decay.

And even at this very time, as I have indi-

cated above, the mass of the people—and I mean great as well as small, cultured and wealthy as well as ignorant and poor—retain their instinctive attachment to the idea of liberty. It is chiefly in a small, but extremely prominent and influential, body of over-sophisticated people—specialists of one kind or another—that the principle of liberty has fallen into the disrepute to which I have referred. The prime reason why the Prohibition law is so light-heartedly violated by all sorts and conditions of men, why it is held in contempt by hundreds of thousands of our best and most respected citizens, is that the law is a gross outrage upon personal liberty. Many, indeed, would commit the violation as a mere matter of self-indulgence; but it is absurd to suppose that this would be done, as it is done, by thousands of persons of the highest type of character and citizenship. These people are sustained by the consciousness that, though their conduct may be open to criticism, it at least has the justification of being a revolt against a law—a law unrepealable by

any ordinary process—that strikes at the foundations of liberty.

Defenders of Prohibition seek to do away with the objection to it as an invasion of personal liberty by pointing out that all submission to civil government is in the nature of a surrender of personal liberty. This is true enough, but only a shallow mind can be content with this cheap and easy disposition of the question. To any one who stops to think of the subject with some intelligence it must be evident that the argument proves either too much or nothing at all. If it means that *no* proposed restriction can properly be objected to as an invasion of personal liberty, because all restrictions are on the same footing as part of the order of society, it means what every man of sense would at once declare to be preposterous; and if it does not mean that it leaves the question at issue wholly untouched.

Submission to an orderly government does, of course, involve the surrender of one's personal freedom in countless directions. But

speaking broadly, such surrender is exacted, under what are generally known as "free institutions," only to the extent to which the right of one man to do as he pleases has to be restricted in order to secure the elementary rights of other men from violation, or to preserve conditions that are essential to the general welfare. If A steals, he steals from B; if he murders, he kills B; if he commits arson, he sets fire to B's house. If a man makes a loud noise in the street, he disturbs the quiet of hundreds of his fellow citizens, and may make life quite unendurable to them. There are complexities into which I cannot enter in such matters as Sunday closing and kindred regulations; but upon examination it is easily enough seen that they fall in essence under the same principle—the principle of restraint upon one individual to prevent him from injuring not himself, but others.

A law punishing drunkenness, which is a public nuisance, comes under the head I have been speaking of; a law forbidding a man to drink for fear that he may become a drunkard

does not. And in fact the prohibitionists themselves instinctively recognize the difference, and avoid, so far as they can, offending the sense of liberty by so direct an attack upon it. It is safe to say that if the Eighteenth Amendment had undertaken to make the *drinking* of liquor a crime, instead of the *manufacture and sale* of it, it could not have been passed or come anywhere near being passed. There is hardly a Senator or a Representative that would not have recoiled from a proposal so palpably offensive to the instinct of liberty. Yet precisely this is the real object of the Eighteenth Amendment; its purpose—and, if enforced, its practical effect—is to make it permanently a crime against the national government for an American to drink a glass of beer or wine. The legislators, State and national, who enacted it knew this perfectly well; yet if the thing had been put into the Amendment in so many words, hardly a man of them would have cast his vote for it. The phenomenon is not so strange, or so novel, as it might seem; it has a standard prototype in

the history of Rome. The Roman people had a rooted aversion and hostility to kings; and no Cæsar would ever have thought of calling himself *rex*. But *imperator* went down quite smoothly, and did just as well.

In addition to its being a regulation of individual conduct in a matter which is in its nature the individual's own concern, Prohibition differs in another essential respect from those restrictions upon liberty which form a legitimate and necessary part of the operation of civil government. To put a governmental ban upon all alcoholic drinks is to forbid the *use* of a thing in order to prevent its *abuse*. Of course there are fanatics who declare—and believe—that *all* indulgence in alcoholic drink, however moderate, is abuse; but to justify Prohibition on that ground would be to accept a doctrine even more dangerous to liberty. It is bad enough to justify the proscription of an innocent indulgence on the ground that there is danger of its being carried beyond the point of innocence; but it is far worse to forbid it on the ground that,

however innocent and beneficial a moderate indulgence may seem to millions of people, it is not regarded as good for them by others. The only thing that lends dignity to the Prohibition cause is the undeniable fact that drunkenness is the source of a vast amount of evil and wretchedness; the position of those who declare that all objections must be waived in the presence of this paramount consideration is respectable, though in my judgment utterly wrong. But any man who justifies Prohibition on the ground that drinking is an evil, no matter how temperate, is either a man of narrow and stupid mind or is utterly blind to the value of human liberty. The ardent old-time Prohibitionist—the man who thinks, however mistakenly, that the abolition of intoxicating drinks means the salvation of mankind—counts the impairment of liberty as a small matter in comparison with his world-saving reform; this is a position from which one cannot withhold a certain measure of sympathy and respect. But to justify the sacrifice of liberty on the ground that the man

who is deprived of it will be somewhat better off without it is to assume a position that is at once contemptible and in the highest degree dangerous. Contemptible, because it argues a total failure to understand what liberty means to mankind; dangerous, because there is no limit to the monstrosities of legislation which may flow from the acceptance of such a view. Esau *sold* his birthright to Jacob for a mess of pottage which he wanted; these people would rob us of our birthright and by way of compensation thrust upon us a mess of pottage for which we have no desire.

Rejecting, then, the preposterous notion of extreme fanatics—whether the fanatics of science or the fanatics of moral reform—we have in Prohibition a restraint upon the liberty of the individual which is designed not to protect the rights of other individuals or to serve the manifest requirements of civil government, but to prevent the individual from injuring himself by pursuing his own happiness in his own way; the case being further aggravated by the circumstance that in order to make this

injury impossible he is denied even such access to the forbidden thing as would not—except in a sense that it is absurd to consider—be injurious. Now this may be benevolent despotism, but despotism it is; and the people that accustoms itself to the acceptance of such despotism, whether at the hands of a monarch, or an oligarchy, or a democracy, has abandoned the cause of liberty. For there is hardly any conceivable encroachment upon individual freedom which would be a more flagrant offense against that principle than is one that makes an iron-bound rule commanding a man to conform his personal habits to the judgment of his rulers as to what is best for him. I do not mean to assert that it necessarily follows that such encroachments will actually come thick and fast on the heels of Prohibition. Any specific proposal will, of course, be opposed by those who do not like it, and may have a much harder time than Prohibition to acquire the following necessary to bring about its adoption. But the resistance to it on specific grounds will lack the

strength which it would derive from a profound respect for the general principle of liberty; whatever else may be said against it, it will be impossible to make good the objection that it sets an evil precedent of disregard for the claims of that principle. The Eighteenth Amendment is so gross an instance of such disregard that it can hardly be surpassed by anything that is at all likely to be proposed. And if the establishment of that precedent should fail actually to work so disastrous an injury to the cause of liberty, we must thank the wide-spread and impressive resistance that it has aroused. Had the people meekly bowed their heads to the yoke, the Prohibition Amendment would furnish unfailing inspiration and unstinted encouragement to every new attack upon personal liberty; as it is, we may be permitted to hope that its injury to our future as a free people will prove to be neither so profound nor so lasting as in its nature it is calculated to be.

Before dismissing this subject it will be well to consider one favorite argument of those

who contend that Prohibition is no more obnoxious to the charge of being a violation of personal liberty than are certain other laws which are accepted as matters of course. A law prohibiting narcotic drugs, they say, imposes a restraint upon personal liberty of the same sort as does a law prohibiting alcoholic liquors. And it must be admitted that there is some plausibility in the argument. The answer to it is not so simple as that to the broader pleas which have been discussed above. Yet the answer is not less conclusive. There is no principle of human conduct that can be applied with undeviating rigor to all cases; and indeed it is part of the price of the maintenance of the principle that it shall be waived in extreme instances in which its rigorous enforcement would shock the common instincts of mankind. Illustrations of this can be found in almost every domain of human action—in the everyday life of each one of us, in the practice of the professions, in the procedure of courts and juries, as well as in the field of law-making. It is wrong to tell a

lie, and there are a few doctrinaire extremists who maintain that lying is not excusable under any circumstances; but the common sense of mankind declares that it is right for a man to lie in order to deceive a murderer who is seeking his mother's life. Physicians almost unanimously profess, and honestly profess, the principle that human life must be preserved as long as possible, no matter how desperate the case may seem; yet I doubt whether there is a single physician who does not mercifully refrain from prolonging life by all possible means in cases of extreme and hopeless agony. Murder is murder, and it is the sworn duty of juries to find accordingly; yet the doctrine of the "unwritten law"—while unquestionably far too often resorted to, and thus constituting a grave defect in our administration of criminal justice—is in some extreme cases properly invoked to prevent an outrage on the elementary instincts of justice. In all these instances we have a principle universally acknowledged and profoundly respected; and the waiver of it in extreme cases, so far from weakening the

principle, actually strengthens it—since if it absolutely never bent it would be sure to break.

And so it is with the basic principles of legislation. To forbid the use of narcotic drugs is a restraint of liberty of the same *kind* as to forbid the use of alcoholic liquors; but in *degree* the two are wide as the poles asunder. The use of narcotic drugs (except as medicine) is so unmitigatedly harmful that there is perhaps hardly a human being who contends that it is otherwise. People *crave* it, but they are ashamed of the craving. It plays no part in any acknowledged form of human intercourse; it is connected with no joys or benefits that normal human beings openly prize. A thing which is so wholly evil, and which, moreover, so swiftly and insidiously renders powerless the will of those who —perhaps by some accident—once begin to indulge in it, stands outside the category alike of the ordinary objects of human desire and the ordinary causes of human degradation. To make an exception to the principle of lib-

erty in such a case is to do just what common sense dictates in scores of instances where the strict application of a general principle to extreme cases would involve an intolerable sacrifice of good in order to remove a mere superficial appearance of wrong. To make the prohibition of narcotic drugs an adequate reason for not objecting to the prohibition of alcoholic drinks would be like calling upon physicians to throw into the scrap heap their principle of the absolute sanctity of human life because they do not apply that principle with literal rigor in cases where to do so would be an act of inhuman and unmitigated cruelty.

CHAPTER X

PROHIBITION AND SOCIALISM

In the foregoing chapter I have said that while absorption in the idea of democracy has had a tendency to impair devotion to the idea of liberty, yet that in democracy itself there is no inherent opposition to liberty. The danger to individual liberty in a democracy is of the same nature as the danger to individual liberty in a monarchy or an oligarchy; whether power be held by one man, or by a thousand, or by a majority out of a hundred million, it is equally possible for the governing power on the one hand to respect, or on the other hand to ignore, the right of individuals to the free play of their individual powers, the exercise of their individual predilections, the leading of their individual lives according to their own notions of what is right or desirable. A monarch of enlightened and

liberal mind will respect that right, and limit his encroachments upon it to the minimum required for the essential objects of reasonable government; so, too, will a democracy if it is of like temper and intelligence.

But it is not so with Socialism. Numerous as are the varieties of Socialism, they all agree in being inherently antagonistic to individualism. It may be pleaded, in criticism of this assertion, that all government is opposed to individualism; that the difference in this respect between Socialism and other forms of civil organization is only one of degree; that we make a surrender of individuality, as well as of liberty, when we consent to live in any organized form of society. It is not worth while to dispute the point; the difference may, if one chooses, be regarded as only a difference of degree. But when a difference of degree goes to such a point that what is minor, incidental, exceptional in the one case, is paramount, essential, pervasive in the other, the difference is, for all the purposes of thinking, equivalent to a difference of kind. Socialism

is in its very essence opposed to individualism. It makes the collective welfare not an incidental concern of each man's daily life, but his primary concern. The standard it sets up, the regulations it establishes, are not things that a man must merely take account of as special restraints on his freedom, exceptional limitations on the exercise of his individuality; they constitute the basic conditions of his life.

When the Socialist movement was in its infancy in this country—though it had made great headway in several of the leading countries of Europe—the customary way of disposing of it was with a mere wave of the hand. Socialism can never work; it is contrary to human nature—these simple assertions were regarded by nearly all conservatives as sufficient to settle the matter in the minds of all sensible persons. That is now no longer so much the fashion; yet I have no doubt that a very large proportion of those who are opposed to Socialism are still content with this way of disposing of it. But Socialism has

steadily—though of course with fluctuations —increased in strength, in America as well as in Europe, for many decades; and it would be folly to imagine that mere declarations of its being "impracticable," or "contrary to human nature," will suffice to check it. Millions of men and women, here in America—ranging in intellect all the way from the most cultured to the most ignorant—are filled with an ardent faith that in Socialism, and in nothing else, is to be found the remedy for all the great evils under which mankind suffers; and there is no sign of slackening in the growth of this faith. When the time comes for a real test of its strength—when it shall have gathered such force as to be able to throw down a real challenge to the conservative forces in the political field—it is absurd to suppose that those who are inclined to welcome it as the salvation of the world will be frightened off by prophecies of failure. They will want to make the trial; and they *will* make the trial, regardless of all prophecies of disaster, if the people shall have come to believe that the *object* is a desirable

one—that Socialism is a form of life which they would like after they got it.

The one great bulwark against Socialism is the sentiment of liberty. If we find nothing obnoxious in universal regimentation; if we feel that life would have as much savor when all of us were told off to our tasks, or at least circumscribed and supervised in our activities, by a swarm of officials carrying out the benevolent edicts of a paternal Government; if we hold as of no account the exercise of individual choice and the development of individual potentialities which are the very life-blood of the existing order of society; if all these things hold no value for us, then we shall gravitate to Socialism as surely as a river will find its way to the sea. Socialism—granted its practicability, and its practicability can never be disproved except by trial, by long and repeated trial—holds out the promise of great blessings to mankind. And some of these blessings it is actually capable of furnishing, even if in the end it should prove to be a failure. Above all it could completely

abolish poverty—that is, anything like abject poverty. The productive power of mankind, thanks to the progress of science and invention, is now so great that, even if Socialism were to bring about a very great decline of productiveness—not, to be sure, such utter blasting of productiveness as has been caused by the Bolshevik insanity—there would yet be amply enough to supply, by equal distribution, the simple needs of all the people. Besides the abolition of poverty, there would be the extinction of many sinister forms of competitive greed and dishonesty. To the eye of the thinking conservative, these things—poverty, greed, dishonesty—while serious evils, are but the blemishes in a great and wholesome scheme of human life; drawbacks which go with the benefits of a system in which each man is free, within certain necessary limits, to do his best or his worst; a price such as, in this imperfect world, we have to pay for anything that is worth having. But to the Socialist the matter presents itself in no such light. He sees a mass of misery

which he believes—and in large measure justly believes—Socialism would put an end to; and he has no patience with the conservative who points out—and justly points out—that the poverty is being steadily, though gradually, overcome in the advance of mankind under the existing order. "Away with it," he says; "we cannot wait a hundred years for that which we have a right to demand to-day."

And "away with it" we ought all to say, if Socialism, while doing away with it, would not be doing away with something else of infinite value and infinite benefit to mankind, both material and spiritual; something with which is bound up the richness and zest of life, not only for what it is the fashion of radicals to call "the privileged few," but for the great mass of mankind. That something is liberty, and the individuality which is inseparably bound up with liberty. The essence of Socialism is the suppression of individuality, the exaltation of the collective will and the collective interest, the submergence of the

individual will and the individual interest. The particular form—even the particular degree—of coercion by which this submergence is brought about varies with the different types of Socialism; but they all agree in the essential fact of the submergence. Socialism may possibly be compatible with prosperity, with contentment; it is not compatible with liberty, not compatible with individuality.

I am, of course, not undertaking here to discuss the merits of Socialism; my purpose is only to point out that those who are hostile to Socialism must cherish liberty. And it is vain to cherish liberty in the abstract if you are doing your best to dry up the very source of the love of liberty in the concrete workings of every man's daily experience. With the plain man—indeed with men in general, plain or otherwise—love of liberty, or of any elemental concept, is strong only if it is instinctive; and it cannot be instinctive if it is jarred every day by habitual and unresented experience of its opposite. Prohibition is a restraint of liberty so clearly unrelated to any primary

need of the state, so palpably bearing on the most personal aspect of a man's own conduct, that it is impossible to acquiesce in it and retain a genuine and lively feeling of abhorrence for any other threatened invasion of the domain of liberty which can claim the justification of being intended for the benefit of the poor or unfortunate.

So long as Prohibition was a local measure, so long even as it was a measure of State legislation, this effect did not follow; or, if at all, only in a small degree. People did not regard it as a dominant, and above all as a paramount and inescapable, part of the national life. But decreed for the whole nation, and imbedded permanently in the Constitution, it will have an immeasurable effect in impairing that instinct of liberty which has been the very heart of the American spirit; and with the loss of that spirit will be lost the one great and enduring defense against Socialism. It is not by the argumentation of economists, nor by the calculations of statisticians, that the Socialist advance can be halted. The real

struggle will be a struggle not of the mind but of the spirit; it will be Socialism and regimentation against individualism and liberty. The cause of Prohibition has owed its rapid success in no small measure to the support of great capitalists and industrialists bent upon the absorbing object of productive efficiency; but they have paid a price they little realize. For in the attainment of this minor object, they have made a tremendous breach in the greatest defense of the existing order of society against the advancing enemy. To undermine the foundations of Liberty is to open the way to Socialism.

CHAPTER XI

IS THERE ANY WAY OUT?

In the second chapter of this book, I undertook to give an account of the state of mind which the enactment of the Eighteenth Amendment has created, and which is at the bottom of that contempt for the law whose widespread prevalence among the best elements of our population is acknowledged alike by prohibitionists and anti-prohibitionists. "People feel in their hearts," I said, "that they are confronted with no other choice but that of either submitting to the full rigor of Prohibition, of trying to procure a law which nullifies the Constitution, or of expressing their resentment against an outrage on the first principles of the Constitution by contemptuous disregard of the law." It is a deplorable choice of evils; a state of things which it is hardly too much to call appalling in its potentialities of civic demoralization.

And one who realizes the gravity of the injury that a long continuance of this situation will inevitably inflict upon our institutions and our national character must ask whether there is any practical possibility of escape from it.

The right means, and the only entirely satisfactory means, of escape from it is through the undoing of the error which brought it about—that is, through the repeal of the Eighteenth Amendment. Towards that end many earnest and patriotic citizens are working; but of course they realize the stupendous difficulty of the task they have undertaken. As a rule, these men, while working for the distant goal of repeal of the Amendment, are seeking to substitute for the Volstead act a law which will permit the manufacture and sale of beer and light wines; a plan which, as I have elsewhere stated, while by no means free from grave objection—for it is clearly not in keeping with the intent of the Eighteenth Amendment—would, in my judgment, be an improvement on the present state of things. But it is not pleasant to contemplate

a situation in which, to avoid something still worse, the national legislature is driven to the deliberate enactment of a law that flies in the face of a mandate of the Constitution.

A possible plan exists, however, which is not open to this objection, and yet the execution of which would not present such terrific difficulty as would the proposal of a simple repeal of the Eighteenth Amendment. That Amendment imbeds Prohibition in the organic law of the country, and thus not only imposes it upon the individual States regardless of what their desires may be, but takes away from the nation itself the right to legislate upon the subject by the ordinary processes of law-making. Now an Amendment repealing the Eighteenth Amendment but at the same time conferring upon Congress the power to make laws concerning the manufacture, sale and transportation of intoxicating liquors, would make it possible for Congress to pass a Volstead act, or a beer-and-wine act, or no liquor act at all, just as its own judgment or desire might dictate. It would give

the Federal Government a power which I think it would be far more wholesome to reserve to the States; but it would get rid of the worst part of the Eighteenth Amendment. And it would have, I think, an incomparably more favorable reception, from the start, than would a proposal of simple repeal. For the public could readily be brought to see the reasonableness of giving the nation a chance, through its representatives at Washington, to express its will on the subject from time to time, and the unreasonableness of binding generation after generation to helpless submission. The plea of majority rule is always a taking one in this country; and it is rarely that that plea rests on stronger ground than it would in this instance. The one strong argument which might be urged against the proposal—namely that such a provision would make Prohibition a constant issue in national elections, while the actual incorporation of Prohibition in the Constitution settles the matter once for all—has been deprived of all its force by our actual experience. So far

from settling the matter once for all, the Eighteenth Amendment has been a frightful breeder of unsettlement and contention, which bids fair to continue indefinitely.

I have offered this suggestion for what it may be worth as a practical proposal; it seems certainly deserving of discussion, and I could not refrain from putting it forward as a possible means of relief from an intolerable situation. But I do not wish to wind up on that note. The right solution—a solution incomparably better than this which I have suggested on account of its apparently better chance of acceptance—is the outright repeal of the Eighteenth Amendment. And moreover, the primary need of this moment is not so much any practical proposal likely to be quickly realized as the awakening of the public mind to the fundamental issues of the case —the essential principles of law, of government, and of individual life which are so flagrantly sinned against by the Prohibition Amendment.

To the exposition of those fundamental issues this little book has been almost exclusively confined. It has left untouched a score of aspects of the question of drink, and of the prohibition of drink, which it would have been interesting to discuss, and the discussion of which would, I feel sure, have added to the strength of the argument I have endeavored to present. But there is an advantage, too, in keeping to the high points. It is not to a multiplicity of details that one must trust in a case like this. What is needed above all is a clear and whole-hearted recognition of fundamentals. And I do not believe that the American people have got so far away from their fundamentals that such recognition will be denied when the case is clearly put before them.

There is one and only one thing that could justify such a violation of liberty and of the cardinal principles of rational government as is embodied in the Eighteenth Amendment. In the face of desperate necessity, there may be justification for the most desperate remedy.

But so far from this being a case of desperate necessity, nothing is more unanimously acknowledged by all except those who labor under an obsession, than that the evil of drink has been steadily diminishing. Not only during the period of Prohibition agitation, but for many decades before that, drunkenness had been rapidly declining, and both temperate drinking and total abstinence correspondingly increasing. It is unnecessary to appeal to statistics. The familiar experience of every man whose memory runs back twenty, or forty, or sixty years, is sufficient to put the case beyond question; and every species of literary and historical record confirms the conclusion. This violent assault upon liberty, this crude defiance of the most settled principles of lawmaking and of government, this division of the country—as it has been well expressed—into the hunters and the hunted, this sowing of dragons' teeth in the shape of lawlessness and contempt for law, has not been the dictate of imperious necessity, but the indulgence of the crude desire of a highly organized but

one-idead minority to impose its standards of conduct upon all of the American people.

To shake off this tyranny is one of the worthiest objects to which good Americans can devote themselves. To shake it off would mean not only to regain what has been lost by this particular enactment, but to forefend the infliction of similar outrages in the future. If it is allowed to stand, there is no telling in what quarter the next invasion of liberty will be made by fanatics possessed with the itch for perfection. I am not thinking of tobacco, or anything of the kind; twenty years from now, or fifty years from now, it may be religion, or some other domain of life which at the present moment seems free from the danger of attack. The time to call a halt is now; and the way to call a halt is to win back the ground that has already been lost. To do that will be a splendid victory for all that we used to think of as American—for liberty, for individuality, for the freedom of each man to conduct his own life in his own way so long as he does not violate the rights of others, for

the responsibility of each man for the evils he brings upon himself by the abuse of that freedom. May the day be not far distant when we shall once more be a nation of sturdy freemen—not kept from mischief to ourselves by a paternal law copper-fastened in the Constitution, not watched like children by a host of guardians and spies and informers, but upstanding Americans loyally obedient to the Constitution, because living under a Constitution which a people of manly freemen can whole-heartedly respect and cherish.

THE END

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